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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,  
ANDREW KOENIG, JERRY NORTON  
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED

Defendant.

NANA REGIONAL CORPORATION and  
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

**PLAINTIFFS' REPLY IN  
SUPPORT OF MOTION  
IN LIMINE TO EXCLUDE  
WITNESSES FOR FAILURE  
TO ADEQUATELY SPECIFY  
TESTIMONY AT THE  
LIABILITY PHASE**

**I. TECK COMINCO MUST DISCLOSE THE TESTIMONY OF WITNESSES AT THE LIABILITY PHASE WITH SPECIFICITY.**

At Docket 211, Adams moved to preclude the testimony of 11 witnesses because Teck Cominco had not provided descriptions of the witnesses's testimony with the requisite specificity, precluding Adams from adequately preparing to cross-examine the witness at trial. Because Teck Cominco had not followed the express instructions of this Court's Pre-Trial Order (Docket 177), Adams respectfully requested that the 11 witnesses be precluded from testifying at the liability phase. Teck Cominco has now responded, at Docket 263. Its response concedes that three of its witnesses will not be offered at the liability phase. Opposition at 3. Other than that, it merely refers to its response to a different motion: "For all the reasons stated in defendants' opposition to the motion at Docket 225, the motion at Docket 211 should be denied as well."

Defendants' opposition to Docket 225 (Docket 261) discusses only the *penalty* phase of the trial. It does not address Adams's challenge to the lack of specificity in Defendants' *liability* phase witness list at Docket 211. Under Local Rule 7.1(d), failure to oppose a motion "may be deemed an admission that... the motion is well taken." D.Ak.L.R. 7.1(d). Defendants have conceded the merits of Adams's motion at the liability phase by not offering any opposition to it, and each of the 11 witnesses should be excluded because of Teck Cominco's failure to follow the Court's Order.

**II. TECK COMINCO VIOLATED THE COURT'S CLEAR INSTRUCTIONS.**

Teck Cominco notes that if a party fails to obey a Court order, the Court may issue any "just" sanction under Rule 16(f) of the Rules of Civil Procedure. Docket 261 at 3. It also notes that "sanctions are precluded unless a party in fact failed to comply with an order." *Id.* Here, that is exactly what Teck Cominco did. The Court's Pre-Trial Order instructed: "As to each witness so listed (even though the witness may have been deposed), counsel will disclose the testimony expected to be elicited from that witness at trial. *The disclosure will be specific and not general*, the purpose being to avoid surprise and delay at trial and *to give opposing counsel an adequate basis for developing cross-examination.*" Docket 177 at 3 (emphasis added).

Despite this clear and explicit instruction, as Adams set out in detail in its Motion, Teck Cominco failed to adequately specify the testimony of 11 witnesses listed on its Liability Phase

1 Witness List. *See* Motion at Docket 211. Teck Cominco has not even addressed the arguments  
2 Adams made in its motion about the specificity of the liability phase witness list, and thus  
3 concedes the motion. D.Ak.L.R. 7.1(d).

4 **III. TECK COMINCO DOES NOT PROVIDE ANY ARGUMENT AS TO THE**  
5 **LIABILITY PHASE IN ITS PENALTY PHASE OPPOSITION.**

6 Adams challenged Teck Cominco's descriptions of testimony of eleven witnesses at the  
7 liability phase as not having enough specificity for Adams to effectively develop cross  
8 examination. Docket 211 at 2-8. While Teck Cominco asserts that "For all the reasons stated in  
9 defendants' opposition to the motion at Docket 225, the motion at Docket 211 should be denied  
10 as well," it makes no arguments relevant to the motion at Docket 211 in its opposition to Docket  
11 225 (Docket 261). Accordingly, the 11 witnesses should be precluded from testifying as Teck  
12 Cominco had both an opportunity to respond, and did not (D.Ak.L.R. 7.1(d)), and also had an  
13 opportunity to cure the defective descriptions, and did not.

14 **A. Defendants have withdrawn Peter Chapman.**

15 Teck Cominco expressly concedes Adams's motion with respect to Peter Chapman,  
16 withdrawing him as a witness at the liability phase. Opposition at 3.

17 **B. Docket 261 does not discuss Joyce Tsuji's liability phase testimony.**

18 Adams moved to exclude part of the testimony of Joyce Tsuji because it is unable to  
19 determine what "work performed by Exponent for Red Dog Mine" might be based on an  
20 examination of Tsuji's expert reports. Docket 211 at 2-3. In reponse, Teck Cominco asserts that  
21 "plaintiffs are familiar with the studies performed by Exponent. They have the studies and know  
22 that they address marine life and also evaluate caribou." Docket 261 at 6. However, Adams is  
23 not familiar with the studies and does not have them. Because the abbreviated description "work  
24 performed by Exponent for Red Dog Mine" does not give enough specificity for Adams to  
25 formulate cross-examination on any such work *and how it relates to liability here* – even after  
26 canvassing every exhibit offered by Teck Cominco for trial and reviewing all three expert reports  
27 filed by Tsuji – Adams respectfully requests that Ms. Tsuji be precluded from testifying about  
28 "work performed by Exponent for Red Dog Mine."

**C. Docket 261 does not discuss Richard Brown's liability phase testimony.**

Teck Cominco does not discuss Richard Brown's liability phase testimony at all in Docket 261, which explains that "Equipment used by Teck Cominco, including that obtained from American Meteorburst, is relevant to many of the claims. Testimony regarding it will enlighten the court with respect to various of the statutory penalty factors, including the seriousness of a violation, the economic benefit, the history of such violations, the good faith efforts to comply with the permit requirements, and numerous other factors as may be required by justice." Docket 261 at 6. This recitation of the *penalty* factors on its face does not pertain to *liability*, or make more specific Mr. Brown's liability phase testimony, thus conceding Adams's motion. D.Ak.L.R. 7.1(d). Accordingly, Adams requests that the Court preclude the testimony of Richard Brown in its entirety at the liability phase.

**D. Docket 261 does not discuss Greg Horner's liability phase testimony.**

Teck Cominco responds to the challenge to Greg Horner by asserting "the relevant studies were produced to the plaintiffs as bates numbers TC 31640 RD to TC 31744 RD." Docket 261 at 6. This does not provide any more specificity to the abbreviated description of Mr. Horner's testimony that Adams objected to, that "Mr. Horner will testify as to studies performed by Ecology and Environment." Liability Phase Witness List at 5. It also does not address in any way how the studies are relevant to the liability phase, conceding Adams's motion. D.Ak.L.R. 7.1(d).

**E. Docket 261 does not discuss Kevin Lackey's liability phase testimony.**

Teck Cominco responds to Adams's objection that the description of Kevin Lackey's liability phase testimony lacked the requisite specificity by asserting, "questions involving what laboratories are in existence, what functions they perform... are likely to be tangential to the subjects raised by the plaintiffs *in the remedial phase*." Docket 261 at 7 (emphasis added). Teck Cominco offers no defense to the challenge to Mr. Lackey's liability phase testimony, conceding Adams's point. D.Ak.L.R. 7.1(d). Adams thus requests that the Court exclude the testimony of Mr. Lackey in its entirety.

**F. Docket 261 does not discuss Jackie Lundberg's liability phase testimony.**

1 Teck Cominco's entire defense of Jackie Lundberg is "They [plaintiffs] similarly know of  
2 Mr. Lundberg's involvement in the alleged port violations as well as his work with respect to  
3 TIE/TRE at Red Dog." Docket 261 at 8. This does not remedy – or even respond to – Adams's  
4 objection that the description of Jackie Lundberg's testimony was not specific enough for Adams  
5 to be able to adequately prepare cross examination, thus conceding the point. D.Ak.L.R. 7.1(d).  
6 Adams thus requests that the Court exclude the testimony of Jackie Lundberg in its entirety.

7 **G. Docket 261 does not discuss Mike Schierman's liability phase testimony.**

8 Adams objected to the description of Mr. Schierman's liability phase testimony on  
9 "weather conditions" as not specific enough and not tied to any liability issue. Docket 211 at 7.  
10 Teck Cominco's response boils down to the sentence: "Every statutory factor that this court will  
11 consider in assessing a penalty involves elements that are, at a minimum, affected by weather."  
12 Docket 261 at 8. Teck Cominco does not address how weather affects *liability* at all, conceding  
13 the merit of Adams's motion. D.Ak.L.R. 7.1(d). This Court should preclude Mr. Schierman  
14 from testifying at the liability phase.

15 **H. Docket 261 does not discuss Mike Stanoway's liability phase testimony.**

16 Teck Cominco's only defense to Adams's objection that the description of Mike  
17 Stanoway's testimony is not sufficiently specific is that "the plaintiffs know who he is and where  
18 he works, and that his work involves such things as Trial Exhibits 1342 and 1231." Docket 261  
19 at 8. Teck Cominco fails to address Adams's motion, and thus concedes it. D.Ak.L.R. 7.1(d).  
20 Teck Cominco's defense does nothing to remedy the fact that the description of his liability  
21 phase testimony is not sufficiently specific to allow Adams to prepare cross examination, and  
22 Adams respectfully requests that Mr. Stanoway's testimony be excluded in its entirety.

23 **I. Docket 261 does not discuss William Stubblefield's liability phase testimony.**

24 Teck Cominco's response to Adams's objection that the description "Dr. Stubblefield  
25 will testify as to WET" was not sufficiently specific to allow Adams to prepare cross  
26 examination is, "the description may be short, but it is very specific." Docket 261 at 8. This glib  
27 response does not cure, or even address, Adams's objection. D.Ak.L.R. 7.1(d). Adams  
28 respectfully requests that the Court exclude Mr. Stubblefield's testimony in its entirety.

**J. Docket 261 does not discuss Jason Weakley's liability phase testimony.**

Teck Cominco's response to Adams's challenge to the specificity of the description of Jason Weakley does not cure, or even really respond, to Adams's objections. Docket 261 at 9. As Adams pointed out in its motion, the "chemistry and treatment of Red Dog water" is a huge topic, potentially encompassing the several hundred chemicals that have been tested for in the Red Dog mine effluent. The "treatment" of the water is also a very general description. Taken as a whole, the description is not sufficiently specific to allow Adams to adequately prepare cross examination. Nothing in Teck Cominco's response changes that deficiency. D.Ak.L.R. 7.1(d). Adams thus requests that the Court exclude the testimony of Jason Weakley.

**K. Docket 261 does not discuss Kathleen Willman's liability phase testimony.**

Adams challenged the specificity of the description of Kathleen Willman's testimony on "water balance issues." Docket 211 at 8. Teck Cominco does not explain how "water balance issues" are relevant *at the liability phase* (see Docket 261 at 5), continuing to leave Adams without the specificity it needs to fashion cross examination. Because Teck Cominco has not addressed Adams's objection, or cured it, the testimony of Kathleen Willman as to "water balance issues" should be excluded. D.Ak.L.R. 7.1(d).

**IV. CONCLUSION**

This Court's instructions to the litigants were clear: the disclosure of expected testimony "will be specific and not general, ... to give opposing counsel an adequate basis for developing cross-examination." Docket 177 at 3. For the eleven witnesses discussed above, Teck Cominco did not meet that simple threshold, and its general, vague, confusing and sparse descriptions did not give Adams an adequate basis for developing cross examination. Nor did Teck Cominco avail itself of the opportunity to cure this defect in its Opposition, instead blithely asserting that a different opposition to a different motion addressed this motion. As demonstrated above, that is not the case. By failing to respond to, or cure, Adams's objections, Teck Cominco has conceded Adams's points. D.Ak.L.R. 7.1(d). In fairness to the parties and to protect Adams's due process rights, Adams respectfully requests that the testimony of these 11 witnesses be excluded.

Respectfully submitted this 29th day of February, 2008.

/S/ Luke Cole  
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Luke Cole  
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of February 2008, a true and correct copy of the foregoing Reply in Support of Objections to Liability Witness List and Motion to Exclude Witnesses for Failure to Adequately Specify Testimony, was served, via electronic mail, on the below identified parties of record:

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/S/Luke Cole

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